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# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. —

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

*v.*

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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### PETITION

The Solicitor General, on behalf of the United States of America, acting upon the relation and for the use of the Tennessee Valley Authority, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming, with modifications, the judgment of award of the United States District Court for the Western District of North Carolina entered in the proceedings to condemn respondent's lands.

## OPINIONS BELOW

The opinion of the District Court (1 R. 23) [1] is reported in 33 F. Supp. 519. The opinion of the Circuit Court of Appeals (4 R. 2) is reported in 118 F. (2d) 79.

## JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 10, 1941 (4 R. 15). A petition for rehearing was denied on May 10, 1941 (4 R. 18). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

## QUESTIONS PRESENTED

The Government condemned lands in and adjacent to the Hiwassee River, a principal tributary of the Tennessee River, for the purpose of constructing a dam in the development of an interstate system for navigation, flood control and related purposes. The major [2] questions presented are:

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[1] Pursuant to stipulation of counsel the record upon this petition consists of the appendix to the Government's brief below (designated as 1 R.), the appendices to the respondent's brief below (2 R. and 3 R.), the proceedings of the court below (4 R.) and a fifth volume of additional matter which respondent desired to have printed in this petition. The original transcript has also been filed with the Clerk.

[2] In addition, there may be a number of subsidiary or related questions growing out of the foregoing questions presented and the Specification of Errors to be Urged, *infra*, pp. 9–11, which in the interest of compactness we have not spelled out.

1. Whether just compensation for the lands must include compensation for their "power" value as well as their value computed without reference to their possible availability for hydroelectric purposes.

2. Whether, even if the first question be answered in the affirmative, it was error to consider evidence of value based upon an imaginary and highly improbable private hydroelectric development.

3. Whether the value of the lands to the Government is a proper element to be considered in determining just compensation.

4. Whether prices paid by the Tennessee Valley Authority for other lands in negotiated purchases and in other condemnation proceedings may be considered in determining the value of the condemned lands.

5. Whether, under Section 25 of the Tennessee Valley Authority Act, the Circuit Court of Appeals must exercise its independent judgment and fix the value of the lands without regard to the awards or findings previously made by the commissioners or by the statutory three-judge district court.

## STATUTES INVOLVED

The Appendix, *infra*, pp. 26–32, contains the applicable provisions of the Tennessee Valley Authority Act of 1933, the Federal Water Power Act, and the Rivers and Harbors Act of 1899.

## STATEMENT

On January 28, 1936, the United States, on behalf of the Tennessee Valley Authority, filed a petition in the United States District Court for the Western District of North Carolina, to condemn certain lands in and adjacent to the Hiwassee River, a major tributary of the Tennessee River.[3] The lands here involved were owned by the Southern States Power Company, which has since assigned its property interest and rights arising out of these proceedings to the respondent W. V. N. Powelson,[4] its sole stockholder.

The property condemned consists of approximately 12,679 acres of land along the Hiwassee River in North Carolina, beginning at a point about twelve miles upstream from the Tennessee-

[3] On the same day, January 28, 1936, the initial declaration of taking was filed in accordance with the provisions of c. 307, 46 Stat. 1421, and Sections 4 (h) and (i) of the Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58, 60, as amended by the Act of August 31, 1935, c. 836, 49 Stat. 1075. Other declarations of taking were filed subsequently. The acreage taken by and money deposited with each declaration are as follows (1 R. 39):

| Date | Acres taken | Money deposited |
|---|---|---|
| January 28, 1936 | 872.6 | $4,001.94 |
| October 22, 1936 | 1,409.6 | 8,768.92 |
| October 12, 1938 | 695.0 | 6,326.27 |
| November 21, 1938 | 9,375.74 | 73,968.14 |
| September 1939 | 35.0 | ---------- |
| | 12,277.94 | $93,065.27 |

[4] For convenience, the Southern States Power Company and W. V. N. Powelson will be referred to interchangeably as "respondent."

North Carolina boundary and extending up the Hiwassee River about 23 miles to the town of Murphy. Only 2,000 acres have been cleared and cultivated. The remaining area is very rough and mountainous, consisting in large part of rock surface, mountain peaks and gorges. (1 R. 26.) At the time these proceedings were initiated practically all of the land was comparatively inaccessible; there were no improved highways on the property, although there were some cart ways. (1 R. 9, 253, 402; Pet. Exs. T, V.)

Pursuant to Section 25 of the Tennessee Valley Authority Act, the District Court appointed three commissioners to take testimony and determine the value of the property. The Government contended that the property was worth only from $97,000 to $146,000, while respondent sought to establish a value of $7,500,000. The central points of difference between the parties were whether the property should be valued on the basis of its usefulness for the production of hydroelectric power and whether the evidence introduced by the respondents was competent and relevant. Over the repeated objection of the Government (1 R. 332–356, 470–475), respondent was permitted to introduce extensive evidence purporting to show that a four-dam hydroelectric development on the Hiwassee River and its tributary, the Nottely River, could be constructed partly on the lands condemned, partly on other lands owned or controlled by respondent, and partly on lands owned by strangers.

Based on calculations as to the cost of constructing the project, together with estimates as to the amount of power that could be produced, the cost of production, and the prices at which such power could be sold, respondent computed an annual profit for the imaginary enterprise, gave it a capitalized value by projecting it arbitrarily into the future, allocated a portion of it to the land in controversy, and emerged with a value of $7,500,000 for the property condemned. (R. 125–126.)

The Government undertook to demonstrate affirmatively that the land had a maximum market value of $141,792.55 (1 R. 301). And although it insisted that respondent's evidence with respect to the imaginary project was incompetent, it undertook to refute the respondent's claims by showing that the property had no commercial value for power purposes. It offered proof that the imaginary project would entail an original outlay far in excess of that suggested by respondent, that the electric energy which such system could develop was less than that claimed by respondent, and that sales of the energy could be made only at distant points, with the consequence that the project would operate at a loss rather than at the attractive profit envisaged by respondent. Moreover, it was shown that although respondent and its predecessors had held the property over a period of 27 years, there was no prospect of any such project within the reasonably near future (1R. 12, 210, 216, 218–219, 225–226, 253, 275).

At the insistence of the commissioners and over the objection of the Government, evidence was introduced as to the prices paid by the Government for other lands both in negotiated purchases and in condemnation proceedings (Transcript 3270, 3272, 4594–4603).

The commissioners found that the land condemned had a value of $1,437,000, and on the theory that respondent was also deprived of the use of its remaining lands as sites for an integrated hydroelectric system, they awarded $253,000 in addition as "severage damages" (1 R. 20–22). An award of $110,000 was made for a small hydroelectric plant in the vicinity of Murphy (1 R. 14–15).

Both parties sought review of the awards before a three-judge district court under Section 25 of the Tennessee Valley Authority Act, but later withdrew their exceptions to the $110,000 award for the Murphy hydroelectric plant.

The District Court fixed the value of the land condemned at $976,289.40, a figure which it reached by placing a value of $200 an acre on the land to be flooded, on the theory that "power value" attached to such land only, and a value of $10 an acre, which it found to be the agricultural value, on all other land (1 R. 33). Severance damages to remaining land of the respondent were placed at $111,791.23 (1 R. 35), and severance damages resulting from the taking of the Murphy

hydroelectric plant were fixed at $100,000 (1 R. 38). To each of these amounts the court added interest at six percent, calculated on the assumption that the value of respondent's lands for water-power purposes was destroyed with the filing of the initial declaration of taking.[5]

On appeal from the District Court's decision, the court below at the outset rejected the Government's contention that under Section 25 of the Tennessee Valley Authority Act, it must exercise its independent judgment and fix the value of the lands without regard to the awards or findings previously made (4 R. 3–4). On the merits, the court likewise ruled against the Government, holding that respondent was entitled to have the property valued on the basis of its potential use

[5] The district court awarded interest from January 28, 1936, the date of the filing of the first declaration of taking, on the total award of $976,289.40 for all the lands taken, both in this and in the subsequent declarations of taking (1 R. 33). In computing the interest, however, there was deducted from the award $4,001.94, the amount deposited in court with the first declaration of taking, and $114,153.40, the value of the lands not covered by the first declaration of taking computed at $10 an acre, which the district court found to be it value for farming, timber growing, and similar purposes. Interest on this $114,153.40, less the deposits thereafter made, was allowed from the several dates of the subsequent declarations of taking (1 R. 40–41). Interest on the $111,791.23 award fixed as the severance damages to remaining land of the respondent was allowed from January 28, 1936. Interest on the $100,000 severance damages from the taking of the Murphy plant was allowed only from the date of the taking of the Murphy plant in September 1939 (1 R. 41–42).

as part of a proposed hydroelectric development, and, with two modifications,[6] affirmed the judgment of the District Court.

### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the respondent was entitled to a valuation of his lands based upon their potential use as part of a hydroelectric development.

2. In failing to hold that the respondent was not entitled to a valuation of his lands based upon their potential use as part of a hydroelectric development because the respondent had no private property in the water power inherent in the flow of the Hiwassee River.

3. In failing to hold that the respondent was not entitled to a valuation of his lands based upon their potential use as a part of a hydroelectric development because such a development would require a combination, through the exercise of the power of eminent domain, of the lands owned by respondent with lands owned by others.

4. In failing to hold that the respondent was not entitled to a valuation of his lands based upon their potential use as part of a hydroelectric de-

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[6] The court excluded $100,000 severance damages for the taking of the Murphy plant (4 R. 12), and $18,907.02 of severance damages attributable to diminution in value of lands owned by a wholly owned subsidiary, unless within thirty days after the mandate was filed in the District Court, the subsidiary should be made a party (4 R. 13–14).

velopment because such development was possible, if at all, only through the combination of respondent's lands with other properties not subject to the exercise of respondent's power of eminent domain, and as to which there was no showing of the possibility of acquisition in any other manner.

5. In failing to hold that the respondent was not entitled to a valuation of his lands based upon their potential use as part of a hydroelectric development on the ground that there was no reasonable probability that the lands of the respondent could have been developed for such purposes in the reasonably near future, except by the Government.

6. In treating as admissible, for consideration in arriving at the value of the undeveloped lands taken, estimates of possible future profits from a hypothetical and unrealized plan of development.

7. In treating as admissible for consideration in arriving at the value of the undeveloped lands taken evidence as to the money spent by respondent in promoting a speculative and unrealized plan of development.

8. In holding that a determination of the value of respondent's lands may properly be based on prices paid by the Government in purchasing or condemning other lands for the same project.

9. In taking into consideration, in valuing the lands taken, the value of the lands to the Government for its purposes and the effect of the potential demand of the Government for such lands.

10. In approving arbitrary valuations of the lands unsupported by the evidence.

11. In awarding compensation for damages to land physically separated from the land taken and not unified with it in any present actual use.

12. In awarding compensation for damages to land not taken, although title to such land was in a corporation having no legal or equitable interest in the land condemned, and in awarding compensation to a person who had no legal or equitable interest in the land held to be so damaged.

13. In computing interest on the award for property taken from a date prior to the date on which the declaration of taking was filed involving such property.

14. In failing to exercise its independent judgment in fixing the value of the property condemned without regard to the awards or findings previously made by the commission or by the district court.

15. In affirming the judgment of the district court as modified.

## REASONS FOR GRANTING THE WRIT

The court below erroneously decided important questions relating to the Federal Government's power of eminent domain that may have a critical impact upon a large number of cases. At the present time the Tennessee Valley Authority has pending 206 condemnation proceedings involving 481 tracts of land, and the Lands Division of the Department of Justice has pending 2,620 condemnation proceedings involving 22,292 tracts of land.

Moreover, these figures may be considerably augmented in the near future as a consequence of the national defense program.

Issues identical with those in the instant case are present in some of the pending cases, and several of the rulings of the court below have potential application in many of the remaining cases. But the importance of this case is not limited to its effect upon pending or possible future cases; it must be judged in the light of the entire land-acquisition program of the Government. One index to the success of this program, both from the point of view of the Government and from that of the landowner, is the percentage of acquisitions which can be completed by negotiated purchases. The decision of the court below, through the confusion caused by its deviation from accepted standards of valuation and its acceptance of theories of value of uncertain future application, is likely to discourage negotiated purchases and promote litigation.

1. The decision below is in substantial conflict with the principles established in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. There, it was held that a landowner had no compensable rights in the flow of a navigable stream, with the consequence that land on the banks of the stream, suitable as a dam site or otherwise useful in the production of hydroelectric power, must have its value determined in condemnation proceedings without regard to its "power" value. Since the

usefulness of the land for power purposes depends upon the ability of the landowner to erect structures in the stream, it is obvious that such use must always be subject to the superior power of the Federal Government to determine that no structures be permitted which would be inconsistent with the plans of the Government for improving the stream in its exercise of the commerce power. The result in the *Chandler-Dunbar* case was thus predicated upon the plenary power of the Federal Government over navigation, and there, as here, the property was condemned for use in an integrated development of an interstate (or international) river system, in the aid of navigation, flood control, and related purposes.

The only difference between the cases is that the lands in the instant case are located above the historic head of navigation. But, under *United States* v. *Appalachian Power Co.*, 311 U. S. 377, that difference cannot be material for the Court there held that the plenary power over navigation may be exercised at a point above the navigable portion of the stream (cf. *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, No. 832, 1940 Term; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Arizona* v. *California*, 283 U. S. 423), and includes "Flood protection, watershed development [and], recovery of the cost of improvements through utilization of power * * *." 311 U. S. at 426.

Even if the applicability of the *Chandler-Dunbar* decision be thought doubtful, it is nevertheless a matter of considerable importance to have the issue clarified. The unified development of the river systems of the country for the purposes of promoting navigation, controlling destructive floodwaters, developing the watershed, and recovering the cost of improvements through the utilization and sale of power is a subject of ever-increasing importance to the Federal Government. Such developments involve the construction of storage dams located on the upper reaches of the river or on its tributaries above the head of navigation, which nevertheless play an essential part in the regulation of the flow of the river system in the interests of navigation and flood control.[7] A determination by this Court of

[7] Where the storage dam is constructed below the historic head of navigation it is settled that under the *Chandler-Dunbar* case dam-site value need not be paid for the land acquired. *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th). In the case of a river system which is being developed pursuant to a unified plan of development, the location of the upstream and tributary storage projects above the historic head of navigation is of little, if any, practical importance. These storage dams are not ordinarily designed to aid navigation at their site; indeed, they may often block it. Their importance is in controlling the flow of the river for the purposes of navigation and flood protection downstream (Res. ex. 204, pp. 16–23, 89–105). *Cf. Arizona* v. *California*, 283 U. S. 423. But if the decision below is allowed to stand, the basis upon which the Government is obligated to pay for sites acquired for tributary and upstream storage dams will depend on this almost fortuitous relationship.

the extent of the Government's liability where it acquires land for these tributary storage dams is thus of great importance to the Government, particularly since the demands of the present emergency may require the Tennessee Valley Authority to construct additional dams on the tributaries of the Tennessee River.

The record leaves no doubt as to the existence of a factual basis for the application of the *Chandler-Dunbar and Appalachian Power Co.* decisions. The site in respondent's hypothetical development which was the farthest downstream was only 24 miles above the historic head of navigation (1 R. 314). The operation of respondent's proposed development would have curtailed navigation on the lower Hiwassee many months of the year and would have had a substantial adverse effect on navigation on the Tennessee (1 R. 310–315).* Operation of the present Hiwassee project by the Government as part of the unified development of the Tennessee River system is of substantial aid to navigation on the Tennessee River and on the Ohio and Mississippi Rivers (Res. ex. 204, p. 98). Any project located at the site of the Hiwassee Dam would be of strategic importance in any program for the control

* Such an effect on navigation would seem to be prohibited under Section 10 of the Rivers and Harbors Act of 1899 (c. 425, 30 Stat. 1121, 1151) as an obstruction to the navigable capacity of the waters of the United States.

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of floods in the Tennessee and Mississippi River Valleys (*id.* at 18–19, 99), and would have great potentialities for good or for evil, depending upon the design and method of operation. A private development for power purposes alone might well result in substantially impairing the flood-protection benefits to be derived from Government projects located below it on the main stream of the Tennessee.[9]

The Federal Water Power Act and Section 26a of the Tennessee Valley Authority Act, as amended,[10] constitute an assumption of federal control of the sort which underlay the decision in the *Chandler-Dunbar* case. Under Section 7 (b) of the Federal Water Power Act, the Federal Power Commission would have been obligated to withhold its consent for the proposed development contemplated by respondent if it had found that this

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[9] Respondent himself graphically described the difference between private operation for power at the particular site in question and Government operation for flood protection (1 R. 99–100, 110–111). Moreover, it appears that in 1924 one of respondent's former subsidiaries (Southern Appalachian Power Company) was specifically advised by the Federal Power Commission that the proposed Murphy project, located above the Hiwassee site, "involves storage and its management to such an extent that it might be a serious detriment to navigation or materially improve it below" and that the Commission would therefore assert jurisdiction over the development under Section 23 of the Federal Water Power Act, as amended (1 R. 201–202).

[10] The applicable provisions of these statutes are set forth in the Appendix, *infra*, pp. 29–30.

development should be undertaken by the United States. Under Section 26a of the Tennessee Valley Authority Act respondent's proposed project could have been constructed only if the plans for its construction and operation had been approved by the Board of Directors of the Tennessee Valley Authority as not being in conflict with its plans for the unified development and regulation of the Tennessee River system. Thus, in this case, as in the *Chandler-Dunbar* case, the landowners' right to erect the structures necessary for the production of water power was dependent upon the decision by the Federal Government that the proposed use of the river did not conflict with the federal program for the development of the river system for the purpose of aiding commerce among the States. In this case Congress, by specifically authorizing the construction of Hiwassee Dam by the Tennessee Valley Authority, has made a determination which precludes the respondent from asserting a right to use the lands for hydroelectric purposes. Under the reasoning of the *Chandler-Dunbar* case, therefore, respondent is not entitled to a valuation of his lands based on their value for dam-site purposes.

2. Even assuming the inapplicability of the rule of the *Chandler-Dunbar* case discussed above, the decision below departs in several important respects from established principles of valuation. For, even if the *Chandler-Dunbar* case does not re-

quire exclusion of any "power" value from the computation of just compensation, the court below erroneously took several factors into account in reaching the conclusion that the property in fact had commercial value for power purposes.

a. In determining that the property had value for power purposes, the court below considered, *inter alia*, its value for power purposes *to the Government*. Thus, the court stated (4 R. 6):

> Even if it be conceded that the property was one which could be developed profitably as a power site only by some company or governmental agency enjoying a low interest rate, its availability for such development should not be ignored in placing a value upon it, *particularly where it is being acquired for the very purpose of such development*. [Italics supplied.]

But it has long been settled that the availability of the property for the condemnor's use is not to be considered in determining just compensation. *United States* v. *Chandler-Dunbar Co.*, *supra* at 80–81; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195.[11] The power of eminent domain exists to enable the condemnor to acquire property without being forced to pay a premium resulting from the value of the land to him.

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[11] See also *McGovern* v. *New York*, 229 U. S. 363, 372; *New York* v. *Sage*, 239 U. S. 57, 61; *Olson* v. *United States*, 292 U. S. 246, 256, 261.

That the court was influenced, in part at least, by the value of the property to the taker, is further confirmed by its treatment of the evidence of prices paid by the Government for other lands in conjunction with the same project. In Reason 3, *infra*, pp. 23–24, we point out the impropriety of using such evidence at all, but at this point we will discuss it solely to show that the value of the property to the condemnor was an element of value that was considered by the court in reaching its composite judgment. The court stated that the Government by prior negotiation had purchased 9,500 acres in the Hiwassee area at a total price of $396,844.79 (4 R. 7–8). This was an average price of approximately $41 an acre. The property purchased by the Government, however, included city property within the town of Murphy and improved tracts used for churches, schools, and mills having a much higher value per acre than the unimproved mountain land of respondent (1 R. 402). After adjustments for such differences, it appeared that the average per-acre price was $27.70, which would result in a total valuation for the lands in suit of $324,953 (1 R. 416). The court, however, disregarded this difference in the character of the land, stating (4 R. 8):

> It is true that a small part of the property thus purchased was town property and that some of the other had been improved and its value increased as a result of such im-

> provement; but, on the other hand, the availability of the land for power purposes constituted its chief element of value as a whole, *and it was for such purpose that it was being acquired.* [Italics supplied.]

Furthermore, even the unadjusted average of $41 an acre, applied to respondent's 12,000 acres, would have produced a value of only $492,000. The use which the court made of these figures in supporting its valuation of $976,289.40 indicates clearly that it was proceeding on the theory of determining value to the taker. The court stated that of 9,500 acres acquired from others at a cost of $396,874.79, only 1,229 acres were actually to be flooded. It further stated that to acquire other lands necessary for the development the Government had spent $158,636, including $96,305 for a talc mine, and that all of the property acquired from others made up only one-fifth of the reservoir. It then stated (4 R. 8):

> If a purchaser felt justified in expending $555,531 for lands to provide approximately one-fifth of the basin of the reservoir, it would not seem unreasonable to place a value of $976,289.40 upon lands which would provide not only the remainder of the basin, but also the dam site necessary to the development.

But this figure of $555,531 was paid not for one-fifth of the land required but for 10,440 acres plus an operating talc mine, or 43 percent of the

total land, all acquired for the project. Accordingly, in this computation the court not only assumed that the figure used by it related only to a small percentage of the lands acquired but also ignored the difference in value between the various types of land involved. That treatment was based upon the theory that since all of the land below the contour line was being acquired for dam-site purposes, it should all be valued upon the basis of its usefulness for that purpose. The court held in effect that since the Government had selected this site for the construction of a dam to serve its constitutional purposes, that fact was relevant to establish a value for dam-site purposes, even though there was no showing of any independent market for such use.

b. In seeking to establish a commercial value of the property for power purposes, respondent was permitted to introduce extensive evidence as to the cost of constructing a hypothetical private hydroelectric development on the lands owned or controlled by him as well as on lands owned by strangers, to compute an imaginary annual profit to be realized from the imaginary enterprise, and to estimate the value of the property by capitalizing these imaginary profits. Although both courts below refused to accept in full the figures employed by respondent, they nevertheless approved the entire line of evidence as competent and merely found a lower valuation than that urged by respondent.

In refusing to reject that evidence in its totality both courts below departed from established principles of valuation. It has been firmly settled that evidence of estimated profits from an unrealized plan of development may not be taken into account.[12] Of course, where property is readily convertible to another use, that fact may be shown in determining its value (cf. *McCandless* v. *United States*, 298 U. S. 342); but where, as here, the property had been held for 27 years (1 R. 12) and where there was no expectation of any such extensive commercial development in the reasonably near future, such evidence was wholly incompetent. Cf. *Olson* v. *United States*, 292 U. S. 246, 257; *Continental Land Co.* v. *United States*, 88 F. (2d) 104, 111 (C. C. A. 9th). Although respondent may have hoped originally to utilize the property for hydroelectric purposes, his attempts to interest private capital in such an enterprise had come to naught (1 R. 216, 218–219, 225–226, 253),[13] and, in essence,

[12] See, e. g., *United States* v. *Meyer*, 113 F. (2d) 387 (C. C. A. 7th); *United Gas Co.* v. *R. R. Comm'n*, 278 U. S. 300, 317–318; *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1st); *San Diego Land & Town Co.* v. *Neale*, 88 Calif. 50, 25 Pac. 977; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

[13] Moreover, respondent owned only a portion of the lands necessary for the imaginary project, and although it had the right of eminent domain in North Carolina, that right could not be considered in determining whether there was a reasonable probability of future development. *New York* v. *Sage*, 239 U. S. 57, 61. And in any event, the necessary lands not owned included lands in Tennessee and Georgia

he is seeking in these proceedings to recoup from the Government, at a profit if possible, his improvident promoter's outlay.[14] In these circumstances, the testimony as to the profits to be derived from the imaginary project was wholly inadmissible.

3. The decision below is in square conflict with *United States* v. *Bailey*, 115 F. (2d) 433 (C. C. A. 5th), in holding that prices paid by the Government for other lands acquired for the same project may be considered in determining just compensation. There, in referring to evidence as to prices paid by the Government for property adjoining the land condemned, the court stated (p. 434):

> Such evidence complicates the record, confuses the issue, is misleading, and especially in condemnation cases, raises collateral issues as to the conditions under which such sales were made; it should have been excluded.

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where respondent did not have the right of eminent domain, as well as lands owned by the United States, the State of North Carolina, and by utilities none of which could have been condemned by respondent. (1 R. 157–168.)

[14] In support of its award the court below emphasized that respondent had expended $1,199,603.27 in an attempt to develop these lands. (4 R. 5.) But this figure was made up of miscellaneous expenditures incurred over a period of nearly 30 years, including such items as New York office expense, taxes paid on the lands, the expense of organizing and dissolving a pyramid of eight or nine separate corporations, travelling expenses, advertising, interest paid on bonds, and fees paid for engineering studies admittedly obsolete at the time of the trial. (1 R. 172, 183–186, 190, 194–198, 204; Res. Ex. 187.) The actual cost of the land condemned was only $277,821.56 (Res. Ex. 363).

Moreover, the question is one of general importance, since it recurs frequently, particularly with respect to the Tennessee Valley Authority. Pursuant to Section 4 (i) of the Tennessee Valley Authority Act, the Authority always endeavors to acquire real estate by purchase before resorting to condemnation, with the result that in almost every instance in which land is condemned, lands in the same vicinity have been acquired by purchase. In many cases it will be to the Government's interest to introduce evidence of prices paid in such purchases, and if the decision below is allowed to stand, the Government will be compelled to take inconsistent positions pending final adjudication of the issue. It is therefore in the public interest that the question be settled.

4. Finally, there exists a square conflict between the Fourth and Fifth Circuits as to the scope of appellate review under Section 25 of the Tennessee Valley Authority Act which provides that the

> * * * circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

The Circuit Court of Appeals for the Fifth Circuit has interpreted these provisions to mean that it must determine the value of the property by ex-

ercising its independent judgment on the record, without giving any weight to the findings of the Commissioners or of the District Court, contrary to the position taken by the court below. *United States* v. *Reynolds*, 115 F. (2d) 294 (C. C. A. 5th); *Stephenson Brick Co.* v. *United States*, 110 F. (2d) 360 (C. C. A. 5th); *United States* v. *Harris*, 115 F. (2d) 343 (C. C. A. 5th); *Finley* v. *United States*, 118 F. (2d) 815 (C. C. A. 5th).

## CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
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WILLIAM C. FITTS, JR.,
*General Counsel,*
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AUGUST 1941.

## APPENDIX

Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58:

SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed

$15 for their services, together with an additional amount of $5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings

the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

* * * * *

SEC. 26a. [As amended by the Act of August 31, 1935, c. 836, 49 Stat. 1075, 1079.] The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

* * * * *

Federal Water Power Act, c. 285, 41 Stat. 1063, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 842, 846:

SEC. 7. * * *

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

SEC. 23. * * *

(b) * * * Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, orporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121:

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and

until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, har-

bor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

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